Trinity Term

[2014] UKSC 49

On appeal from: [2013] CSIH 22

JUDGMENT

Healthcare at Home Limited (Appellant) vThe Common Services Agency (Respondent) (Scotland)

before

Lord Mance

Lord Kerr

Lord Sumption

Lord Reed

Lord Hughes

JUDGMENT GIVEN ON

30 July 2014

Heard on 23 June 2014

Appellant	Respondent
Craig R K Sandison QC	Alistair Clark QC
Gordon Watt	Sean Smith QC
(Instructed by Maclay Murray & Spens LLP)	(Instructed by NHS National Services Scotland Central Legal Office)

LORD REED (with whom Lord Mance, Lord Kerr, Lord Sumption and Lord Hughes agree)

Introduction

1.
The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years.

2.

The horse-drawn bus between Knightsbridge and Clapham, which Lord Bowen is thought to have had in mind, was real enough. But its most famous passenger, and the others I have mentioned, are legal fictions. They belong to an intellectual tradition of defining a legal standard by reference to a hypothetical person, which stretches back to the creation by Roman jurists of the figure of the bonus paterfamilias. As Lord Radcliffe observed in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696, 728:

“The spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.”

3.
It follows from the nature of the reasonable man, as a means of describing a standard applied by the court, that it would misconceived for a party to seek to lead evidence from actual passengers on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable men, the evidence would be beside the point. The behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court. The court may require to be informed by evidence of circumstances which bear on its application of the standard of the reasonable man in any particular case; but it is then for the court to determine the outcome, in those circumstances, of applying that impersonal standard.

4.
In recent times, some additional passengers from the European Union have boarded the Clapham omnibus. This appeal is concerned with one of them: the reasonably well-informed and normally diligent tenderer.

The reasonably well-informed and diligent tenderer

5.
The RWIND tenderer, as he has been referred to in these proceedings, was born in Luxembourg. He owes his existence to the EU directives concerned with public procurement. For present purposes, the most significant directive is Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30 April 2004, p 114). The background to the Directive, as explained in the second recital to the preamble, is that the award of contracts by public authorities in the member states is subject to the principles of freedom of movement of goods, freedom of establishment and freedom to provide services, and to other principles derived from those, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In particular, as explained in the forty-sixth recital:

“Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. …

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation - established by case-law - to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender.”

6.
These general principles are reflected in the requirements laid down in Directive 2004/18. In particular, article 2 requires that “contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way”. Article 41 entitles unsuccessful candidates to be informed of the reasons for the rejection of their applications. Article 53 sets out requirements governing the disclosure of the criteria for the award of public contracts.

7.
It was in order to articulate the standard of clarity required in this context by the principle of transparency that the European Court of Justice invoked the RWIND tenderer. In the case of SIAC Construction Ltd v County Council of the County of Mayo (Case C-19/00) [2001] ECR I-7725, where there was a disagreement between the parties as to the interpretation of tender documents, the court stated:

“41. Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (see, by analogy, Case C-275/98Unitron Scandinavia and 3-S [1999] ECR 1-8291, paragraph 31).”

More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.”

8.
In that passage, the court explained what the legal principle of transparency meant in the context of invitations to tender for public contracts: the award criteria must be formulated in such a way as to allow all RWIND tenderers to interpret them in the same way. That requirement set a legal standard: the question was not whether it had been proved that all actual or potential tenderers had in fact interpreted the criteria in the same way, but whether the court considered that the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers.

9.
The objective nature of the standard to be applied also appears from the opinion of Advocate General Jacobs in the same case:

“The national court should take into consideration not merely the literal terms of the contract documents but also the way in which they may be presumed to be understood by a normally experienced tenderer” (para 51: emphasis supplied).

10.
That the standard is objective also appears from the opinion of Advocate General Sharpston in Lämmerzahl GmbH v Freie Hansestadt Bremen (Case C-241/06) [2008] 1 CMLR 462. The case concerned another directive which is relevant to the present appeal, namely Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30 December 1989, p 33). Article 1 of the Directive requires member states to take the measures necessary to ensure that:

“… as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in articles 2 to 2f of this Directive, on the grounds that such

decisions have infringed Community law in the field of public procurement or national rules transposing that law.”

11.
The issue in the case was whether a national time limit for the bringing of proceedings was compatible with Directive 89/665. The time limit started to run if the alleged irregularity was identifiable on the basis of the tender notice. The Advocate General posed the question as to what was the degree or nature of knowledge of an irregularity which might be attributed to a tenderer without breaching the effectiveness principle underlying Directive 89/665. She observed:

“66. It seems to me that a requirement of actual, or subjective, knowledge on the part of the tenderer would run counter to legal certainty. Furthermore, in circumstances such as those of the present case, it could be difficult to prove that a tenderer had actual knowledge of an irregularity, and a requirement of such proof would hardly be consistent with the need for a rapid review process.

67. It therefore seems preferable to formulate the test in terms of a standard of deemed, or objective, knowledge. The court already applies an objective standard in respect of tenderers' ability to interpret award criteria against the yardstick of equality of treatment in public procurement, namely the ability of a ‘reasonably well-informed and normally diligent tenderer’. The same formula seems appropriate in the context of what knowledge of an irregularity in the tender procedure it is reasonable to deem a tenderer to possess.”

12.
As the Advocate General noted in that passage, the yardstick of the RWIND tenderer is an objective standard applied by the court. An objective standard of that kind is essential in order to ensure equality of treatment, as the court explained in SIAC. In addition, as the Advocate General explained, such a standard is consistent with legal certainty: something which would be undermined by a standard which depended on evidence of the actual or subjective ability of particular tenderers to interpret award criteria in a uniform manner. Furthermore, to require proof of the subjective understanding of tenderers would be inconsistent with the need for review to be carried out as rapidly as possible, as required by article 1 of Directive 89/665. The latter requirement has also been emphasised by the Court of Justice: see for example Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH (Case C-470/99) [2002] ECR I-11617, para 74.

13.
Judgments of the Court of Justice subsequent to SIAC are consistent with this approach. An example is the case of EVN AG v Austria (Case C-448/01) [2003] ECR I-14527, which concerned the award of a contract for the supply of electricity. The invitation to tender required tenderers to state the amount of electricity which could be supplied from renewable sources. It was contended by an unsuccessful tenderer that that requirement lacked the transparency required by the predecessor directive to Directive 2004/18, because there was a failure to specify the period of time in respect of which the amount that could be supplied was to be stated. The Court of Justice said:

“56. It is clear from the court's case-law that the procedure for awarding a public contract must comply, at every stage, with both the principle of the equal treatment of potential tenderers and the principle of transparency so as to afford all parties equality of opportunity in formulating the terms of their tenders (see, to that effect, Universale-Bau, paragraph 93).

57. More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way (SIAC Construction, paragraph 41).

58. Consequently, in the case at issue in the main proceedings, the fact that in the invitation to tender the contracting authority omitted to determine the period in respect of which tenderers had to state in their tenders the amount of electricity from renewable energy sources which they could supply could be an infringement of the principles of equal treatment and transparency were it to transpire that that omission made it difficult or even impossible for tenderers to know the exact scope of the criterion in question and thus to be able to interpret it in the same way.

59. Inasmuch as that requires a factual assessment, it is for the national court to determine, taking account of all the circumstances of the case, whether, despite that omission, the award criterion at issue in the main proceedings was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts."

14.
The rationale of the standard of the RWIND tenderer is thus to determine whether the invitation to tender is sufficiently clear to enable tenderers to interpret it in the same way, so ensuring equality of treatment. The application of the standard involves the making of a factual assessment by the national court, taking account of all the circumstances of the particular case.

15.
The standard of the RWIND tenderer has been applied by the Court of Justice and the General Court in a number of cases in which those courts have themselves had to determine whether tender documents complied with the standard. An example is the case of Commission of the European Communities v Netherlands (Case C-368/10) [2012] 3 CMLR 234, which concerned the compatibility with Directive 2004/18 of a tender specification for drinks machines which contained generally expressed requirements relating to sustainability. The court stated:

"109. The principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract …

110. As the Advocate General stated in point 146 of her opinion, it must be held that the requirements relating to compliance with the 'criteria of sustainability of purchases and socially responsible business' and the obligation to 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' are not so clear, precise and unequivocal as to enable all reasonably informed tenderers exercising ordinary care to be completely sure what the criteria governing those requirements are. The same applies, and all the more so, in relation to the requirement addressed to tenderers that they state in their tender 'in what way [they] fulfil' those criteria or 'in what way [they] contribute' to the goals sought by the contracting authority with regard to the contract and to coffee production, without precisely indicating to them what information they must provide."

16.

In that case, as in other direct actions where the RWIND tenderer test has been applied (such as Evropaïki Dynamiki – Proigmena SystimataTilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the EuropeanCommunities) (Case T-59/05) (unreported) 10 September 2008 and Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kaiTilematikis AE v European Maritime Safety Agency (EMSA) (Case T-70/05) [2010] ECR II-313), the court arrived at its conclusion on the basis of its consideration of the relevant documents, without requiring evidence as to the interpretation placed on the documents by actual or potential tenderers.

The provision of reasons

17.
As I have explained, article 41 of Directive 2004/18 imposes on contracting authorities a duty to inform any unsuccessful candidate, on request, of the reasons for the rejection of his application. Guidance as to the effect of that duty can be found in the judgment of the Court of First Instance in Strabag Benelux NV v Council of the European Union (Case T-183/00) [2003] ECR II-138, paras 54-58, where the court stated (para 54) that the obligation imposed by an analogous provision was fulfilled if tenderers were informed of the relative characteristics and advantages of the successful tenderer and the name of the successful tenderer. The court continued (para 55):

“The reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the court to exercise its supervisory Jurisdiction.”

The Court of Justice stated in Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities (Case C-561/10 P), judgment of 20 September 2011 (unreported), paras 25 and 27, that the contracting authority is not obliged to produce a copy of the evaluation report or to undertake a detailed comparative analysis of the successful tender and of the unsuccessful tender.

The present case

18.
The present case concerns a tendering process carried out by the respondent in 2010 in respect of the provision of medical services to health authorities in Scotland. The appellant was the existing supplier of the services in question, but was unsuccessful in a tender competition for a replacement contract. It challenged that decision on the ground that the respondent had breached certain of its duties under the Public Contracts (Scotland) Regulations 2006 (SSI 2006/1), which implemented Directives 89/665 and 2004/18. In particular, it complained that the criteria in the invitation to tender were insufficiently clear, and that the reasons given to it for the rejection of its tender were unclear and lacking in detail.

19.
Following an eight day proof, at which the appellant adduced evidence from a number of witnesses to the effect that they had not understood the criteria in the same way as the successful tenderer, the appellant’s case was rejected by the Lord Ordinary, Lord Hodge: [2012] CSOH 75. In relation to the clarity of the criteria, he expressed the opinion that it was unrealistic to require a contracting authority to frame its invitation to tender in such detail that two reasonable people could not reach different views on its interpretation. He noted that there were practical limits to the extent to which a contracting authority could spell out every aspect of what its criteria might entail, and stated that it was implicit in the RWIND tenderer test that the court should ask what would have been reasonably

foreseeable by a RWIND tenderer as being encompassed by the stated criteria. Applying that objective approach to the invitation to tender, in the light of evidence as to the relevant context, he concluded that the criteria met the required standard of clarity. In relation to the reasons given, he applied the approach which I have described in paragraph 17 in the light of the evidence, and concluded that the reasons which had been given were adequate: the appellant could have been left in no real doubt as to why it had been unsuccessful, and as to the relative characteristics and advantages of the successful tenderer. The appellant was able to assert its rights before the courts.

20.
An appeal to the Inner House was refused, for reasons set out in an opinion delivered by the Lord Justice Clerk, Lord Carloway: [2013] CSIH 22; 2013 SC 411. In his opinion, the Lord Justice Clerk recalled what the Court of Justice had said about the requirement of transparency in SIAC, namely that the test was whether the invitation to tender had formulated the criteria "in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way" (para 52). He observed (para 57):

"The criteria must be formulated in such a manner as to allow all reasonably well informed and diligent tenderers to interpret them uniformly. If such a tenderer could, 'understandably and plausibly' … have construed the criteria in different ways then the criteria must be deemed insufficiently transparent. However, that is a long way from a proposition that the mere fact that a tenderer, who might normally be regarded as reasonably well informed and diligent, construed the criteria in his own particular way is destructive of the process. For such an outcome, the court has to be satisfied that the interpretation was open to the hypothetical tenderer and not simply that the unsuccessful tenderer had been reasonably well informed and diligent and in fact reached that interpretation."

The Lord Justice Clerk also observed that it was relevant to consider what the hypothetical RWIND tenderer would have anticipated was entailed by the criteria, but expressed doubt as to whether it was useful or appropriate to employ in this context the concept of reasonable foreseeability: a concept which appeared to add nothing to the established jurisprudence in this field but which, because of its familiarity in other branches of the law, might cause confusion in this context.

21.
In the appeal to the Inner House, counsel for the appellant founded on evidence which had been led before the Lord Ordinary as to witnesses' understanding of the invitation to tender. Counsel sought to rely on the evidence in order to establish how a RWIND tenderer would have understood the criteria in question. The Lord Justice Clerk considered however that the attempt to establish by evidence how the RWIND tenderer would have understood the criteria was misguided (para 60).

22.
The Lord Justice Clerk also observed that it was of considerable importance that decisions of the courts on the validity of a tendering process were taken with all due expedition, so that the parties could know, without delay, whether or not the contract was going to proceed. Unless there was a strong reason to suppose that it would cause injustice, such decisions ought to be capable of being taken in the absence of detailed oral testimony. If it were otherwise, a swift decision would be almost impossible.

23.
In relation to the adequacy of the reasons given, the Inner House followed the same approach as the Lord Ordinary and arrived at the same conclusion.

The appeal

24.
In its appeal to this court, the appellant challenges the conclusions reached by the courts below both in relation to the clarity of the tender criteria and in relation to the adequacy of the reasons given for the rejection of its tender.

25.
In relation to the tender criteria, the appellant submits that the Inner House erred in treating the RWIND tenderer as a hypothetical construct, and in applying the RWIND tenderer standard not according to the evidence of witnesses as to what an actual tenderer did or thought, but according to the court's assessment of what a hypothetical RWIND tenderer would have done or thought. The evidence of witnesses from an actual tenderer as to their understanding of the tender criteria, far from being irrelevant, established what RWIND tenderers actually understood, unless it were shown that the witnesses were not reasonably well-informed or normally diligent. The courts below had, it was submitted, confused the RWIND tenderer test with the interpretation of a contract: an objective test was appropriate in the latter context, but not in the former.

26.
For the reasons I have explained at paragraphs 2-3 and 7-12, these submissions are in my view ill-founded. I agree with the way in which this issue was dealt with by the Lord Justice Clerk:

"The court's decision will involve it placing itself in the position of the reasonably informed tenderer, looking at the matter objectively, rather than, as occurred here to a degree, hearing evidence of what such a hypothetical person might think … Although different from an orthodox exercise in contractual interpretation, the question of what a reasonably well-informed and normally diligent tenderer might anticipate or understand requires an objective answer, albeit on a properly informed basis. Just like those other juridical creations, such as the man on the Clapham omnibus (delict) or the officious bystander (contract), the court decides what that person would think by making its own evaluation against the background circumstances. It does not hear evidence from a person offered up as a candidate for the role of reasonable tenderer. In a disputed case, the court will, no doubt, need to have explained to it certain technical terms and will have to be informed of some of the particular circumstances of the terms or industry in question, which should have been known to informed tenderers. However, evidence as to what the tenderers themselves thought the criteria required is, essentially, irrelevant." (para 60)

27.
As the Lord Justice Clerk made clear, evidence may be relevant to the question of how a document would be understood by the RWIND tenderer. The court has to be able to put itself into the position of the RWIND tenderer, and evidence may be necessary for that purpose: for example, so as to understand any technical terms, and the context in which the document has to be construed. But the question cannot be determined by evidence, as it depends on the application of a legal test, rather than being a purely empirical enquiry. Although, as counsel for the appellants emphasised, the question is not one of contractual interpretation – the issue is not what the invitation to tender meant, but whether its meaning would be clear to any RWIND tenderer – it is equally suitable for objective determination.

28.
I also agree with the Lord Justice Clerk that it is unnecessary, and potentially confusing, to introduce the concept of reasonable foreseeability in the present context. The Lord Ordinary's reference to

reasonable foreseeability did not however lead him into error: in substance, he and the Inner House applied the same objective test by considering what a RWIND tenderer would have understood as being encompassed or entailed by the terms of the invitation to tender.

29.
Counsel for the appellant also submitted that the Lord Ordinary and the Inner House had erred in concluding that a number of specific aspects of the invitation to tender complied with the requisite standards of transparency. In each case, the argument was essentially that the court had erred in holding that the meaning of the relevant criterion would have been sufficiently clear to a hypothetical RWIND tenderer, in the light of evidence that it had not been clear to witnesses whose understanding was said to be representative of that of a RWIND tenderer. Once it is accepted, however, that the courts below applied the correct legal test, this court will not readily interfere with the conclusion which they reached in the light of their evaluation of the evidence (cf Biogen Inc v Medeva plc [1997] RPC 1, 45; In re B (A Child) (Care Proceedings: Threshold Criteria)[2013] UKSC 33; [2013] 1 WLR 1911). There is no suggestion that circumstances entitling this court to interfere might exist in the present case, if the principal submission, that the courts below erred in law in their treatment of the evidence in question, were rejected. In these circumstances, it is unnecessary to repeat the analysis carried out by the Inner House.

30.
It was also submitted that the courts below had erred in concluding that the reasons given to the appellants for the rejection of their tender were adequate. As I have explained, however, the courts below applied the approach laid down by the Court of Justice. It is not the function of this court to review their findings, in the absence of any error of law in their approach to the evidence or some other recognised ground for interfering with their assessment.

Conclusion

31.
For these reasons, I would dismiss the appeal.